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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CHRISTOPHER A. CARRASCO, Petitioner, **v.** **ROBERT A. HOREL, Warden,** Respondent.	C 07-5666 MMC (PR)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF THE CASE

In 2001, a jury found petitioner guilty of assault by means of force likely to produce great bodily injury, battery with serious bodily injury, and the use of methamphetamine.[1/] 2 CT 472-482.[2/]

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1. Petitioner was convicted along with four co-defendants: Steven Pena, Andres Perez, Jerry Patlan, and Gustavo Castaneda. *See* 2 CT 472-482.

2. "CT" refers to the State Court Clerk's Transcript, which is contained in Exhibits 1A to 1C filed in support of the Answer. "RT" refers to the State Court Reporter's Transcript, which is contained in Exhibits 2A to 2F filed in support of the Answer. The number preceding "CT" or "RT" refers to the volume number, and the number following refers to the page number.

The jury also found true the allegation that the assault and battery were committed for the benefit of a criminal street gang. 2 CT 472-482. Petitioner admitted that he had three prior strike convictions, one prior serious felony conviction, and three prior prison terms. 2 CT 469, 489. The trial court sentenced petitioner to 33 years to life in state prison. 3 CT 770-774.

In 2005, the California Court of Appeal reversed petitioner's gang enhancement, but otherwise affirmed the judgment. Exh. 3. The California Supreme Court denied petitioner's petition for review, but granted the State's petition for review. Exhs. 4-6. The court deferred further action in the matter pending resolution of a related issue in *People v. Modiri*, S120238. Exh. 6. The court denied petitioner's petition for writ of habeas corpus. Exhs. 7-8.

In 2007, the California Supreme Court transferred the case back to the California Court of Appeal for reconsideration of its earlier opinion in light of the Supreme Court's holding in *People v. Modiri*, 39 Cal.4th 481 (2006). Exh. 9. The Court of Appeal vacated a portion of its previous opinion as to one of petitioner's co-defendants, but left intact its ruling as to petitioner's judgment. Exh. 10. Petitioner did not seek review of the court's opinion on remand.

On November 7, 2007, petitioner filed the instant petition. On April 11, 2008, the Court ordered respondent to show cause why the petition should not be granted.

STATEMENT OF FACTS

The facts were summarized by the California Court of Appeal as follows:

> On October 27, 2000, Charlie Langenegger was serving time in Santa Clara County Jail, and housed in a 16-man cell, with four of the named defendants (Gustavo Castenada, Jerry Patlan, Steven Pena and Andres Perez) and others. Defendant Christopher Carrasco was housed in a four-person cell across the walkway. Langenegger worked as a barber in the jail and as such, was given certain privileges, including being allowed to go to different parts of the facility.
>
> That night, Langenegger was asleep on his bunk, when he was awakened by someone calling his name. He went to the front gate of the cell and was hit multiple times from behind. According to his testimony at trial, he did not see who hit him, but he could tell that there was more than one person involved. Langenegger was hit and kicked numerous times, and eventually yelled to the guard, "Man down."
>
> Correctional Officer Lee testified that he responded to the call and found

Langenegger holding on to the cell gate and looking dazed. He reported that Langenegger said: " 'Chris called me to the gate. I got out of bed, and Norteños jumped me.' " Officer Lee took Langenegger to another location, and then investigated the incident. In the cell, he noticed defendant Patlan breathing rapidly.

At trial, Osvaldo Pascali, a cellmate who witnessed the attack, testified. He said that Carrasco called Langenegger to the gate, and Perez hit him in the head from behind. Pascali said that Pena, Patlan and Castenada joined the attack and kicked and punched Langenegger, as he fell to his knees and then to the ground. Pascali reported the same details to Officer Lee. Pascali also said he was afraid for his safety as a result of his testimony. He testified that he was currently in protective custody within the jail, but still did not feel adequately protected. He said that a person who is labeled a "snitch" is often killed.

Sergeant Marc Tarabini, a jail supervisor, called Langenegger after he was sent to the emergency room. When Sergeant Tarabini asked who had attacked him, Langenegger refused to give names, saying he was afraid of the Norteños. Langenegger told Tarabini that the Norteños "run the tier and run the whole place." He said that he was being pressured by Norteños to run "kites" (messages passed by inmates) to the maximum security area and that he had refused.

When Langenegger returned from the hospital, Officer Lee contacted him and gave him the names of the defendants, and asked if they were the ones who attacked him. According to Officer Lee, Langenegger nodded his head and thanked him.

At trial, Langenegger denied making any of the statements about the attack as reported by Tarabini or Lee. He testified that his only statements were that he did not know who attacked him. He also admitted to a code of silence in prison, and said that an inmate testifying against another inmate would be stabbed. He said that protective custody does not provide protection from this type of retaliation. Langenegger also testified as to his injuries: his jaw was broken, it was wired shut for four months, and required several surgeries. He also suffered extensive bruising and a chipped hip bone.

Also at trial, Sergeant Tarabini testified about an interview he had with defendant Carrasco on the night of the incident. According to Tarabini, Carrasco admitted that he had called Langenegger to the gate because Langenegger had "[d]isrespected a Norteño gang member" and "had to be checked." Sergeant Tarabini also noticed that Carrasco appeared to be under the influence of a stimulant, and Carrasco admitted using methamphetamine that night.

Various law enforcement officers testified at trial concerning the evidence of gang membership accumulated on each of the defendants.

Sergeant David Miranda qualified as a gang expert with the Department of Corrections, and explained that "The Machine" is a regimented exercise program performed by Norteño gang members while in custody. Sergeant Miranda testified in detail about the origins of the Norteño gang especially in prison. He explained membership requirements, as well as specific tattoos and the color red as common symbols. He further opined that, based on the facts of the case, he believed that the assault on Langenegger was carried out with the

specific intent to promote and further Norteño gang activity. He also found significant defendant Carrasco's statement to Sergeant Tarabini, that Langenegger had "disrespected a Norteño gang member" and "had to be checked." This statement showed the attack was gang-related, according to Miranda.

Several defendants presented witnesses at trial. Defendant Perez testified himself and stated that he was not a Norteño gang member and did not know the defendants when he was first placed in cell 336. He also testified that he called Langenegger to the bars, and as Langenegger approached, Perez punched him in the mouth. As Langenegger staggered, Perez continued to punch him, and he denied that anyone else was involved in the assault. Perez explained that about 20 minutes before the assault, he learned that Langenegger had previously been convicted of rape. Perez's younger sister had been raped and he was upset that the rapist was released after only a year in custody. Perez's mother Alice testified, and confirmed the details surrounding the sister's rape. She also testified that she had never known Perez to be involved in a gang, and that before he was incarcerated, he was working 12 to 14 hours a day. Correctional Officer Dennis Cortez also testified that he was a long-time friend of Perez's and had never known him to be involved in a gang.

Defendant Patlan called Parole Agent Michelle Donovan as a witness to give details about Osvaldo Pascali's parole hearing on November 8, 2000. Agent Donovan testified that Pascali was returned to custody on a parole violation on October 10, 2000, and at his hearing on November 8, he received credit for time served and was released. She admitted that she had mentioned to the parole hearing officer that Pascali had cooperated in the investigation of five other inmates, but she did not believe that fact had any bearing on the result of the parole hearing.

Defendant Pena presented evidence that there were 16 people housed in cell 336 on the night of the incident, and that seven of them were believed to be gang members.

Defendants were all charged with assault by means of force likely to produce great bodily injury (Pen.Code, § 245, subd. (a)(1); count 1), and battery with serious bodily injury (§§ 242, 243, subd. (d); count 2). The information also alleged personal infliction of great bodily injury and offenses committed for the benefit of a criminal street gang. (§§ 12022.7, 186.22, subd. (b)(1).) (Prior convictions and strikes were also individually alleged.) A jury found the defendants guilty as charged.

Exh. 3 at 2-5, footnotes omitted.

STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which imposes a "highly deferential" standard for evaluating state court rulings and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537

U.S. 19, 24 (2002) (per curiam). Under AEDPA, the federal court has no authority to grant habeas relief unless the state court's ruling was "contrary to, or involved an unreasonable application of," clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). A decision constitutes an unreasonable application of Supreme Court law only if the state court's application of law to the facts is not merely erroneous, but "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Thus, "[o]nly if the evidence is 'too powerful to conclude anything but' the contrary" should the court grant relief. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005)). The petitioner bears the burden of showing that the state court's decision was unreasonable. *Visciotti*, 537 U.S. at 25.

When there is no reasoned opinion from the highest state court on the petitioner's claim, the court looks to the last reasoned state court opinion in deciding the petition. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-806 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). When there is no reasoned opinion, the state court's decision is still reviewed under AEDPA's objectively reasonable standard on federal habeas. While federal habeas review is not de novo in such a case, an independent review of the record is necessary to determine whether the state court's decision was objectively unreasonable. *Doe v. Woodford*, 508 F.3d 563, 567 (9th Cir. 2007).

ARGUMENT

I.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Petitioner raises several claims of prosecutorial misconduct. We note that petitioner raised his claims for the first time on state habeas. *See* Exh. 7. Accordingly, there is no reasoned state court decision addressing his claims. We consider each alleged instance of prosecutorial misconduct in turn below.

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A. The Prosecutor Did Not Present False And Misleading Testimony In The Form Of Sergeant Miranda's Testimony Regarding The Norteno Gang

Petitioner contends that Sergeant Miranda's testimony that the Norteno gang is a "monolithic northern California Hispanic prison gang" was "false and misleading" because "there is no single 'Norteno' prison gang operating in California." Petition at 6G; *see also* Exh. 7 at 8. Petitioner asserts that the term "Norteno" is a custodial designation for Hispanic inmates from northern California rather than a gang identification. Petition at 6G; *see also* Exh. 7 at 8-9. Petitioner cites generally to Officer Lee's preliminary hearing testimony as evidence that Sergeant Miranda's testimony was false and misleading. Petition at 6G-6H; *see also* Exh. 7 at 9. However, a review of both officers' testimony reveals that they were in accord on the existence and structure of the Norteno gang.

A prosecutor violates due process by obtaining a conviction through false or misleading evidence. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). To succeed on a claim under *Napue*, a petitioner must show: "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." *Hayes v. Brown,* 399 F.3d 972, 984 (9th Cir. 2005) (en banc).

Officer Lee testified at the preliminary hearing that he was working as a correctional officer at the Santa Clara County jail on the night of the assault. 1 CT 74-75. He also qualified as an expert witness on the subject of prison gangs inside the Santa Clara County jail. 1 CT 80. He described the Norteno gang as an organized Hispanic gang from northern California that operates both inside and outside the Santa Clara County jail. 1 CT 81. The gang is made up of members from different "sets," or neighborhoods. 1 CT 103, 108. Inside prison, Nortenos affiliate with the Nuestra Familia prison gang. 1 CT 103.

Sergeant Miranda testified that he was a correctional officer at San Quentin State Prison. 5 RT 621-622. He qualified as an expert witness on the subject of gangs. 5 RT 624, 632. He testified that before 1998, Norteno was simply a geographic term used by state prison inmates to identify which part of California they were from. 5 RT 627, 632. After 1998, however, the term

Norteno came to be applied to a northern California Hispanic gang that arose out of the Nuestra Familia and Northern Structure prison gangs. 5 RT 632-636. State prison authorities recognize the difference between a Hispanic inmate who simply hails from northern California and a member of the Norteno gang. 5 RT 719. The Norteno gang is made up of members from different "regiments," which are organized by area or city. 5 RT 665. Inside prison, the Norteno gang encompasses both the Northen Structure and Nuestra Familia prison gangs. 5 RT 632-635, 646. The Norteno gang is run by the leaders of Nuestra Familia. 5 RT 664.

Both officers, then, testified that the Norteno gang is an "organization" of several northern California Hispanic gangs, and not simply a geographic term to describe which region of the state an inmate hails from. There is thus no support for petitioner's argument that Sergeant Miranda's testimony was actually false or that the prosecutor knew or should have known of its falsity based on Officer Lee's testimony.

Petitioner also contends that the prosecution's presentation of "tattoos as evidence of gang membership" was false and misleading because "tattoos alone cannot be used" by state prison authorities to validate an inmate as a member of a gang. Petition at 6H; *see also* Exh. 7 at 9. However, just because state prison authorities must rely on at least three pieces of evidence to validate an inmate as a gang member in order to house him in the Security Housing Unit does not mean that Sergeant Miranda was foreclosed from basing his opinion of gang membership in this case on tattoos and evidence surrounding the assault. Again, there is no support for petitioner's argument that Sergeant Miranda's testimony was actually false or that the prosecutor knew or should have known of its falsity based on state prison policy. Moreover, given Sergeant Miranda's testimony that petitioner's tattoos could not be used to show gang affiliation, *see* 5 RT 673, petitioner cannot show that the tattoo evidence was material to his case.

In any event, petitioner could have suffered no prejudice as a result of such testimony because the judgment on his gang enhancement was reversed by the California Court of Appeal on direct appeal. Federal habeas relief is therefore unwarranted on this claim. *Fry v. Pliler*, 127 S.Ct. 2321, 2328 (2007) (constitutional error must have a substantial or injurious effect on the verdict).

B. The Prosecutor Did Not Present False And Misleading Evidence In The Form Of Pascali's Testimony Identifying The Defendants As The Assailants, Or Regarding Pascali's Motivation For Testifying

Petitioner next asserts that Pascali's testimony identifying the defendants as the assailants in this case was false and misleading. Petitioner asserts that at trial, Pascali falsely identified Patlan rather than Perez as the first person to assault Langenegger, in contrast to his statement to Officer Lee immediately after the attack, in which he identified Perez as the initial assailant. Petition at 6I; *see also* Exh. 7 at 10. Petitioner also asserts that Pascali falsely identified Castenada as one of the assailants, contrary to the posttrial declaration of Roman Rodriguez Lara stating that Castenada was not involved in the attack. Petition at 6I; *see also* Exh. 7 at 10-11.

However, while Pascali initially identified Patlan at trial as the first attacker, he changed his testimony after remembering that Perez was actually the first person to attack Langenegger. 3 RT 271-272. Pascali's testimony was therefore consistent with his statement to Officer Lee, *see* 4 RT 419-421, and there is no support for petitioner's suggestion that he testified falsely on this point. "'[M]ere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.'" *Henderson v. Campbell*, 2007 WL 781966 at *20 (N.D. Cal. 2007) (quoting *Coe v. Bell,* 161 F.3d 320, 343 (6th Cir.1998)); *see also United States v. Zuno-Arce,* 44 F.3d 1420, 1423 (9th Cir. 1995) (no evidence of prosecutorial misconduct where discrepancies in testimony could as easily flow from errors in recollection as from lies).

Nor can petitioner demonstrate that Pascali falsely identified Castenada as one of the assailants simply by pointing out that Castenada's bunkmate, in a posttrial declaration filed in support of Castenada's state habeas petition, claimed that Castenada did not participate in the attack. *See, e.g., United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992) (finding that inconsistencies between the testimony of witnesses does not establish the presentation of false evidence). Even if such conflicting statement by Castenada's bunkmate were sufficient to show the falsity of Pascali's testimony, such statement was not available to the prosecutor at trial, which defeats any claim that the prosecutor knew or should have known of the falsity of Pascali's testimony. On the contrary, because Pascali's identification of Castenada was consistent with his statement to Officer Lee

immediately after the attack, *see* 4 RT 419-421, the prosecutor had every reason to believe the truth of such testimony. In sum, no prosecutorial misconduct in the presentation of false evidence is shown.

Petitioner additionally contends that the prosecutor presented false and misleading evidence that Pascali expected no benefit when he spoke to authorities after the assault. Petition at 6I-6J; *see also* Exh. 7 at 11. Petitioner asserts that while Pascali and Officer Lee both testified that Pascali neither asked for nor was promised any benefit in exchange for talking to jail authorities about the assault, Officer Lee's reference to Pascali in his report as an "informant" proves that Pascali did indeed expect some benefit in talking to authorities. Petition at 6I-6J; *see also* Exh. 7 at 11. In addition, petitioner asserts that General Order #21.00 of the Santa Clara County Sheriff's Office defines a confidential informant as an individual who is "'willing to provide information to law enforcement *based on considerations other than good citizenship.*'" Petition at 6J, emphasis added by petitioner; *see also* Exh. 7 at 11. Petitioner contends that had jurors known that Pascali expected some benefit when he talked to authorities, they would have discounted his identifications of the defendants as Langenegger's assailants. Petition at 6J; *see also* Exh. 7 at 12.

What petitioner neglects to mention is that the reason why Officer Lee referred to Pascali as an "informant" in his report was for Pascali's own protection, not because Pascali asked for or was promised anything in return for talking to authorities. 4 RT 421; *see also* 3 RT 372-373. Moreover, petitioner's reference to the definition of a confidential informant in General Order #21.00 proves nothing, given Officer Lee's testimony that he used the word "informant" in a manner different from the General Order. *See* 4 RT 421. In sum, there is no evidence to support petitioner's contention that Pascali expected or was offered some benefit in talking to authorities, or that the prosecution knew or should have known about such evidence. On the contrary, Pascali's and Officer Lee's testimony establish that no such benefits were contemplated or discussed when Pascali spoke to authorities after the attack. *See* 3 RT 286, 303-305, 321-322, 327-329, 372-373; 4 RT 421, 430-432, 435, 450. Accordingly, the record does not support petitioner's claim of prosecutorial misconduct.

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C. The Prosecutor Did Not Commit Misconduct During His Closing Argument By Relying On Evidence Presented At Trial That The Attack On Langenegger Was Gang Motivated And That Langenegger And Pascali Were Afraid To Testify Against Gang Members

Petitioner next claims that the prosecutor committed misconduct during his closing argument by using the Norteno gang evidence to inflame the passions of the jury. Petition at 6J; *see also* Exh. 7 at 12. The record of the prosecutor's argument, however, undermines petitioner's claim.

To prevail on a claim of prosecutorial misconduct based on improper closing argument, a petitioner must show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of Due Process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986). Moreover, constitutional error from prosecutorial misconduct does not warrant habeas relief unless the prosecutor's argument had "[a] substantial and injurious effect or influence in determining the jury's verdict." *Sandoval v. Calderon,* 241 F.3d 765, 778 (9th Cir. 2000) (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 638 (1993)).

Petitioner contends that the prosecutor's references to the strength and dangerousness of the Norteno gang in the introductory remarks of his closing argument were meant only to inflame the passions of the jury. Petition at 6J-6K; *see also* Exh. 7 at 12. However, when read in context, it becomes apparent that the prosecutor's comments about the gang were not meant to be inflammatory. Rather, the prosecutor was advancing his theory that the attack on Langenegger was gang related, and explaining why Langenegger, Pascali, and other inmates were afraid to testify against the defendants. *See* 6 RT 831-832. For instance, in arguing that the attack on Langenegger was gang motivated, the prosecutor pointed out that "[i]f you rebel and don't go along with the program, things happen to you. That is what happened to Charlie, okay." 6 RT 831. In addition, to explain why Pascali was the only witness to come forward to identify the defendants, the prosecutor noted that other witnesses "don't want to be injured, they don't want to die, they don't want to be attacked by other inmates and the gang members." 6 RT 831.

Petitioner also contends that the prosecutor committed misconduct by arguing "that the jury must convict in order to protect not only the jail, but the entire criminal justice system against

'the gang.'" Petition at 6K; *see also* Exh. 7 at 13. However, when read in context, it is apparent that the prosecutor was not urging the jury to ignore the evidence and convict the defendants in order to protect society. Rather, the prosecutor was again explaining why Langenegger and Pascali were afraid to testify against the defendants, and exhorting jurors not to let the gang's intimidation of those witnesses prevent them from returning a guilty verdict. *See* 6 RT 832-833. Even if the prosecutor's remarks could be interpreted in the manner suggested by petitioner, they would still not rise to the level of prosecutorial misconduct. *See Duckett v. Mullin*, 306 F.3d 982, 990 (10th Cir. 2002) (appeal to societal harm does not violate due process); *Sublett v. Dormire*, 217 F.3d 598, 601 (8th Cir. 2000) (urging jury to send a message with its sentence did not affect fairness of trial).

In sum, the prosecutor's argument was a fair comment on the evidence, and did not so infect the trial with unfairness as to make the resulting conviction a violation of due process. Even if the prosecutor's remarks rose to the level of prosecutorial misconduct, petitioner cannot show that they had a substantial and injurious effect on the jury's verdict. The comments petitioner complains about occurred within the first few pages of the prosecutor's lengthy closing argument, *see* 6 RT 831-859, and were followed by equally lengthy defense closing arguments and the prosecutor's rebuttal argument. *See* 6 RT 859-951. It is thus unlikely that the comments had a lasting impression in the minds of the jurors. Moreover, we note that none of the defense counsel objected to the prosecutor's remarks, which suggests that counsel did not perceive the remarks as improper or prejudicial. *See Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (noting that counsel's failure to object is relevant to the fundamental fairness assessment). Further, the jury was instructed that the arguments of the attorneys were not evidence. *See* 6 RT 956; *see also Drayden v. White*, 232 F.3d 704, 713 (9th Cir. 2000) (relying in part on court's instruction to jury that statements made by attorneys during trial are not evidence to support finding that prosecutor's comments did not violate due process). Finally, given Langenegger's and Pascali's identification of petitioner as the instigator of the assault, *see* 3 RT 265, 273; 4 RT 412, 416, 421, as well as petitioner's own admission that he was the one to call Langenegger to the front of his cell, *see* 4 RT 546, the prosecutor's remarks could not have had a substantial and injurious effect on the verdict against petitioner. *See Drayden v.*

White, 232 F.3d at 713-714 (relying in part on the strong evidence of guilt to reject misconduct claim).

D. The Prosecutor Did Not Suppress Evidence That Pascali Acted As An Informant In The Past

Petitioner next contends that the prosecutor suppressed evidence that Pascali had acted as an informant in the past to avoid going to state prison, and had a similar motivation for testifying in this case. Petition at 6m-6n; *see also* Exh. 7 at 15. Not so.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999) (footnote omitted). Prejudice requires a reasonable probability, based on all of the evidence, that the defendant would have realized a more favorable verdict if the undisclosed evidence had not been suppressed. *Strickler*, 527 U.S. at 282, 289-290.

Petitioner provides no evidentiary support for his contention that Pascali acted as an informant in the past. Rather, the evidence is to the contrary. Pascali was asked on cross-examination if he had been "helping guards in the jail by making drug buys and that type of thing" at the time of the assault in this case. 3 RT 312. The prosecutor objected, noting that "[t]his is the first I've heard of any such thing" and that "I haven't been given discovery of this if this is true." 3 RT 312-313. The trial court ordered defense counsel to make an offer of proof before continuing with such questioning. 3 RT 313.

Outside the presence of the jury, a hearing was conducted pursuant to California Evidence Code section 402. *See* 3 RT 316-320. Defense counsel argued that on the tape of Pascali's last parole hearing, he thought he heard Pascali's parole agent refer to Pascali making "buys" while in

jail. 3 RT 316. The prosecutor denied hearing any reference to "buys" on the tape. 3 RT 316. Defense counsel was allowed to ask Pascali if he had ever bought or sold drugs on behalf of jail authorities. 3 RT 318-319. Pascali denied helping out jail authorities in this manner. 3 RT 319. At the conclusion of the hearing, the trial court granted defense counsel's request to ask Pascali the same question in front of the jury based on counsel's representation that he would be calling Pascali's attorney from the parole hearing to impeach Pascali's testimony. 3 RT 317, 319; *see also* 3 RT 325.

When cross-examination resumed, Pascali again denied working undercover for jail authorities. 3 RT 328-329. Officer Lee also denied on cross-examination that Pascali had helped out jail authorities on any other matters besides the assault case. 4 RT 422, 440. Ultimately, the defense did not present the witness promised during the section 402 hearing, and no other evidence was presented at trial to impeach the testimony of either Pascali or Officer Lee. *See* 5 RT 789-810. In sum, petitioner has failed to show that Pascali acted as a jail informant in the past, and that such evidence was suppressed by the prosecution.

E. The Prosecutor's Evidence That Pascali Did Not Testify In Exchange For Favorable Treatment At His Parole Revocation Hearing And That He Absconded From Parole Because He Feared Retaliation By The Nortenos Was Not False And Misleading

Petitioner next asserts that the "prosecutor's evidence and argument that Pascali did not testify in exchange for favorable treatment, and that he absconded because he feared retaliation by members of the "Norteno" gang, are belied by his criminal history, and were false and misleading." Petition at 6R; *see also* Exh. 7 at 19. There is no merit to this claim.

1. Trial Testimony

On October 10, 2000, Pascali was arrested on a parole violation for a failed drug test and placed in the county jail. 3 RT 184, 194-196, 264, 298-299; 5 RT 790, 804. On October 23, 2000, he received a "screening" offer of six months jail time. 3 RT 324-325, 369; 5 RT 790, 792, 805. His parole agent was surprised by the offer and thought it was "very high" considering that a typical offer for a failed drug test would be anywhere from no jail time up to four months. 5 RT 792, 797.

Pascali rejected the offer and asked for a parole revocation hearing. 3 RT 324-325, 369-370; 5 RT 792. His parole agent thought it was "a smart move" to reject the offer. 5 RT 797.

On October 27, 2000, Pascali was still in custody awaiting his parole revocation hearing when the assault in this case took place. 3 RT 184, 194-196, 264, 298-299; 5 RT 790. Immediately after the assault, Pascali spoke to Officer Lee and identified the defendants as the assailants. 3 RT 277; 4 RT 414, 417-421, 427. Even though Pascali knew what happened to "snitches" in jail, he agreed to talk to Officer Lee because he liked Langenegger, "felt bad" about what had happened to him, and wanted to do the "right thing." 3 RT 304; 4 RT 432. He neither expected nor asked for anything in exchange for his cooperation, and was offered nothing in return. 3 RT 304, 373; 4 RT 421, 430-432, 552-553; 5 RT 589-590. The only thing he did ask was that Officer Lee keep Pascali's cooperation "in the back of [his] mind." 4 RT 435.

Officer Lee knew Pascali was in custody on a parole violation at the time he interviewed him, and so he asked Pascali about his parole status. 3 RT 303; 4 RT 428-429. He did not offer to help Pascali on the parole matter if he cooperated with authorities, but merely took note of his parole status in order to relay that information to his supervisor. 3 RT 303-304; 4 RT 428-431, 440.

Pascali told Officer Lee that he was scared of the defendants and would not testify against them unless he were out of custody. 3 RT 321-322; 4 RT 435, 450, 552. Because he was still in custody at that time, he asked that his identity be kept a secret until after he was released from jail. 3 RT 372; 4 RT 421.

On November 8, 2000, Pascali's parole revocation hearing took place. 3 RT 286, 299, 325; 5 RT 790, 793. At some point before the hearing, Sergeant Tarabini, Officer Lee's superior officer, informed Pascali's parole agent, Michelle Donovan, about Pascali's cooperation on the assault case, but did not specifically ask for her help in getting Pascali released from custody. 5 RT 603-604, 806-809. On the day of the hearing, Pascali separately mentioned his cooperation with authorities to Donovan. 5 RT 795, 808.

Donovan spoke on Pascali's behalf at the parole revocation hearing. 3 RT 286-287, 325; 5 RT 793. She primarily focused on Pascali's good performance on parole, but also mentioned his

cooperation with jail authorities. 3 RT 287, 325-328, 370; 5 RT 795-796. Donovan recommended that Pascali be given credit for time served and ordered to complete a drug treatment program. 5 RT 794, 796. While she did not normally make such a recommendation, she felt it was justified in Pascali's case given that most first-time parolees who fail a drug test are referred to outpatient drug treatment rather than sent back to jail. 5 RT 795-796. The parole board adopted Donovan's recommendation, and Pascali was released from custody that same day. 3 RT 287, 345; 5 RT 794, 802. In all, Pascali served approximately 30 days for the parole violation. 3 RT 299, 324; 5 RT 794.

In Donovan's opinion, the information about Pascali's cooperation with authorities was not the primary reason for the parole board's decision and "probably [had] no bearing at all" on its disposition. 5 RT 795. While Donovan mentioned it to the board because Pascali asked her to, her recommendation was based solely on Pascali's good performance on parole. 5 RT 795-796. In its written disposition, the parole board noted only petitioner's good performance on parole, and not his cooperation with authorities, as the reason for giving him credit for time served. 5 RT 798-799.

Pascali, too, denied that he received any benefit at his parole revocation hearing as a result of his cooperation with authorities on the assault case, and believed that the only reason why he received such a favorable disposition was because of his otherwise good performance on parole. 3 RT 327-329, 352. Pascali testified that he would have still been willing to testify against the defendants even if he had not received credit for time served at his parole revocation hearing. 3 RT 304-305.

On December 13, 2000, while he was still out of custody, Pascali testified against the defendants at their preliminary hearing. 3 RT 257-259.

A few months later, Pascali was cited for a second parole violation—driving under the influence—and released. 3 RT 260, 345-346; 5 RT 803. He knew that a person in custody who has been labeled a "snitch" is often killed, and he was afraid of going back to prison if his parole were revoked. 3 RT 260, 314. He therefore called the prosecutor and asked if he "could help [him] out with [his] parole officer and [his] parole violation." 3 RT 260-261, 313-314. The prosecutor told Pascali that he "would put in a good word for [him] at [his] parole hearing but . . . couldn't make any

promises." 3 RT 261. After talking to the prosecutor, Pascali absconded from parole. 3 RT 261, 346; 5 RT 802-803. The main reason why he absconded was because he was afraid he would be killed if he testified against the defendants while in custody. 3 RT 261-262, 346.

Two weeks before the trial in the assault case, Pascali was apprehended on his DUI parole violation and placed in protective custody within the jail, where he was still incarcerated at the time of trial. 3 RT 257, 260-262, 345, 375. He did not feel entirely safe in protective custody, and was afraid of what would happen to him if he returned to state prison. 3 RT 263, 371-372. He did not want to testify, and the only reason why he was present in court was because the prosecutor had forced him to appear. 3 RT 257. The prosecutor made no promises to Pascali in exchange for his testimony. 3 RT 286. At the time of trial, Pascali had still not received a parole revocation hearing on his DUI parole violation. 5 RT 803-804. He was looking at a potential disposition ranging anywhere from credit for time served up to one year in state prison. 5 RT 810.

2. The Trial Testimony Was Not False And Misleading

Petitioner contends that the above evidence was false and misleading because "Pascali's criminal record demonstrates that he had a history of absconding from and failing probation and parole supervision. His actions between his testimony at [the] preliminary hearing and at trial were typical, rather than being the result of fear of the alleged 'Norteno' gang." Petition at 6Q; *see also* Exh. 7 at 19. However, petitioner offers no support for his contention that Pascali had a history of absconding from probation and parole. In fact, the testimony at trial established that it was Pascali's first time on parole. 3 RT 340, 342-344. And even if petitioner could establish that Pascali had a history of absconding, such evidence would not prove that Pascali's stated reason for absconding in this case—his fear of retaliation by the Nortenos—was false. Indeed, there was ample evidence to support such reason—Pascali's status as a snitch, his understanding of what Nortenos did to snitches, and the evidence regarding the dangerousness of the Norteno gang.

Petitioner also contends that "[i]t was misconduct to allow the jury to believe that Pascali's treatment at his November 8, 200[0] hearing did not constitute favorable treatment. In view of his long criminal history, his manipulation of the criminal justice system and repeated dishonesty, it was

false and misleading to equate Pascali with a 'whistle blower' who gets a reward after telling the truth." Petition at 6R; *see also* Exh. 7 at 19-20. Petitioner, however, does not explain how the prosecution's evidence was false and misleading. Pascali, Officer Lee, and Sergeant Tarabini all denied that Pascali was promised anything in exchange for talking to jail authorities. Rather, Officer Lee and Sergeant Tarabini decided on their own accord to pass along the information of Pascali's cooperation to his parole agent, without asking for any special treatment in return. And while Donovan passed the information along to the parole board, her recommendation and the board's disposition were based on the relatively minor nature of the parole violation and Pascali's otherwise good performance on parole. In sum, there is no indication in the record that Pascali received favorable treatment at his parole hearing based on his cooperation in this case. The mere fact of Pascali's criminal history—of which the jury was well aware, *see* 3 RT 259-261, 297-299, 305, 340-346—fails to establish the falsity of such evidence.

F. The Prosecutor Did Not Introduce Involuntary Statements Or Improperly Collected Evidence

1. Alleged Involuntary Statements

Petitioner next claims that both his and Langenegger's statements to jail authorities after the assault were involuntary and, thus, improperly admitted at trial. Petition at 6S-6V; *see also* Exh. 7 at 20-24. Petitioner additionally challenges his statement under *Miranda v. Arizona*, 384 U.S. 436 (1966). Petition at 6T; *see also* Exh. 7 at 22.

Under the Fourteenth Amendment, involuntary confessions are inadmissible in state criminal trials. *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960). Voluntariness is evaluated by reviewing both the police conduct in extracting the confession and the effect of that conduct on the defendant. *Miller v. Fenton*, 474 U.S. 104, 116 (1985). Where there is no causal connection between the police conduct and the confession, there is no basis for concluding that a confession was involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1985).

In determining voluntariness, the court must look at the totality of the circumstances surrounding the confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-227 (1973). "The test

is whether, considering the totality of the circumstances, the [state] obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988).

Petitioner first contends that his statement to Sergeant Tarabini was involuntary under the Fourteenth Amendment because he was under the influence of methamphetamine, and Sergeant Tarabini continued to interview him despite knowing this. While Sergeant Tarabini did testify that petitioner displayed outward symptoms of being under the influence of methamphetamine during the interview, *see* 4 RT 548, there is no evidence that petitioner's statement was involuntary. If a confession is the product of a rational intellect and a free will, then it is voluntary regardless of the defendant's intoxication. *See Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (finding that although petitioner was intoxicated at the time he gave police a statement, the statement was voluntary because statement was product of rational mind and petitioner's free will). Approximately six hours had passed between petitioner's methamphetamine use and his interview with Sergeant Tarabini. *See* 4 RT 409, 547. During the interview, petitioner was able to understand Sergeant Tarabini's *Miranda* warnings. 4 RT 545-546. He was also able to answer Sergeant Tarabini's questions regarding his methamphetamine use and the attack on Langenegger. 4 RT 546-547. Under these circumstances, there is no evidence that petitioner's statement was not the product of a rational mind and free will.

Petitioner next contends that his statement to Sergeant Tarabini violated the Fifth Amendment because he did not expressly waive his *Miranda* rights. Petitioner raised this same argument in the trial court, where a hearing was held pursuant to California Evidence Code section 402. During the hearing, Sergeant Tarabini testified that as he read petitioner his *Miranda* rights, petitioner kept interrupting him, insisting he already understood his rights. 4 RT 534. Sergeant Tarabini continued to give petitioner a complete *Miranda* admonishment, and when he was done, he asked petitioner if he understood his rights. 4 RT 534. Petitioner said yes, and began answering Sergeant Tarabini's questions regarding the assault. 4 RT 534-535. Petitioner did not invoke his *Miranda* rights during the interview. 4 RT 535. Based on Sergeant Tarabini's testimony, the trial

court found that petitioner had impliedly waived his *Miranda* rights. 4 RT 539.

Under *Miranda*, a waiver can be either express or implied. *North Carolina v. Butler*, 441 U.S. 369, 373 n.4 (1979). The record of the section 402 hearing supports the trial court's finding of an implied waiver in this case. Petitioner indicated that he understood his rights even before Sergeant Tarabini had finished with the *Miranda* warning. Afterward, petitioner expressly acknowledged that he understood his rights and voluntarily answered Sergeant Tarabini's questions without invoking his *Miranda* rights. Petitioner's decision to talk to Sergeant Tarabini while at the same time understanding his *Miranda* rights supports the trial court's finding of an implied waiver. *See Ylst v. Nunnemaker*, 501 U.S. at 801-806 (federal habeas court looks to the last reasoned state court decision in deciding the petition); *Shackleford v. Hubbard*, 234 F.3d at 1079 n.2 (same).

We next address petitioner's claim regarding Langenegger's statements to Officer Lee and Sergeant Tarabini. "In general, [a defendant] does not have standing to challenge a violation of another's rights; however, illegally obtained confessions may be less reliable than voluntary ones, and thus using a coerced confession at another's trial can violate due process." *Douglas v. Woodford*, 316 F.3d 1079, 1092 (9th Cir. 2003). However, habeas relief is warranted only if the admission of such statement "rendered the trial so fundamentally unfair as to violate due process." *Williams v. Woodford*, 384 F.3d 567, 593 (9th Cir. 2004).

Here, there is no indication that Langenegger's statements to jail authorities were involuntary, and thus, unreliable. Petitioner makes the unsubstantiated allegation that jail officials withheld medical treatment from Langenegger for five days in order to coerce him into giving a statement. *See* Petition at 6U; *see also* Exh. 7 at 23. However, the record is clear that outside hospital officials were the ones who denied Langenegger treatment after the attack, *see* 3 RT 190, 203, 392, and there is no evidence that the treatment was denied simply to coerce Langenegger to talk to jail authorities. While Langenegger was admittedly in pain at the time he was interviewed by Officer Lee and Sergeant Tarabini, 3 RT 190-192; 4 RT 415-417, 432-433, 543-544, the interviews each lasted only one or two minutes at most. 3 RT 210-211; 4 RT 432. Moreover, both officers were able to understand Langenegger when they spoke to him. 4 RT 433, 540-541. In

addition, Langenegger clearly remembered being interviewed by both officers, and gave no indication that his statements to them were involuntary. 3 RT 210-212. Under these circumstances, it cannot be said that the admission of Langenegger's statements violated due process.

Even if there were error in the admission of either of these statements, such error would be subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 306-312 (1991). Habeas relief is appropriate only if the involuntary statement had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Pope v. Zenon*, 69 F.3d 1018, 1025 (9th Cir. 1995) (quoting *Brecht v. Abrahamson*, 507 U.S. at 637). Here, Pascali's testimony alone established that the Nortenos attacked Langenegger, and that petitioner was the one to initiate the attack. Pascali's testimony was consistent with his statement to jail authorities immediately after the attack, and his credibility was not seriously impeached at trial. Moreover, Langenegger's spontaneous statement to Officer Lee immediately after the attack—that petitioner called him to the front of the cell and the Nortenos attacked him, 4 RT 412—corroborated Pascali's testimony. As for petitioner's contention that there would have been no evidence as to the reason for the attack without his and Langenegger's statements, we note that the motive behind the attack was not an element of either the assault or battery. Further, because petitioner's gang enhancement was reversed by the California Court of Appeal, petitioner could have suffered no substantial or injurious effect as the result of any lack of evidence regarding the motivation for the attack. Accordingly, petitioner is not entitled to habeas relief on this claim.

2. Alleged Improper Collection Of Evidence

Petitioner next challenges Sergeant Tarabini's practice of gathering evidence from his officers and memorializing their findings, along with his own, in one report. Petition at 6V-6X; *see also* Exh. 7 at 24-26. Petitioner cites only one case in support of his argument, *Kyles v. Whitley*, 514 U.S. 419, 446-448 & n.15 (1995). In that case, the prosecution failed to disclose exculpatory evidence discovered during a police investigation. Here, by contrast, petitioner does not contend that the prosecution withheld evidence from the investigation conducted by jail authorities. Rather, he takes issue with the manner in which such evidence was memorialized by Sergeant Tarabini.

However, petitioner and his co-defendants were able to cross-examine both Sergeant Tarabini and Officer Lee about the findings of their investigation, as well as their methods for recording those findings. *See* 4 RT 424-425; 5 RT 586-588, 591-592, 605, 621. Petitioner's rights to the discovery of exculpatory material, to the effective assistance of counsel, and to confront and cross-examine the witnesses against him were not therefore violated.

II.

TRIAL COUNSEL WAS NOT INEFFECTIVE

Petitioner contends that trial counsel was ineffective for failing to do the following: (1) moving to exclude petitioner's and Langenegger's statements to Sergeant Tarabini as coerced and unreliable; (2) investigating Pascali's record and background further and impeaching him with the resulting information, as well as objecting to the prosecutor's evidence and argument regarding Pascali's credibility; (3) presenting an expert witness to discredit Sergeant Tarabini's investigative procedures; (4) investigating Langenegger's "change in testimony" regarding when his jaw was broken; and, (5) presenting a gang expert to rebut the testimony of the prosecution's gang expert. Petition at 6X-6Z; *see also* Exh. 7 at 26-28. Like his prosecutorial misconduct claims, petitioner raised his ineffectiveness claims for the first time on state habeas. Accordingly, there is no reasoned state court decision addressing his ineffectiveness claims. We address each claimed instance of ineffective assistance of counsel in turn below.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, he would have received a more favorable result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On federal habeas, a petitioner must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam).

Petitioner cannot satisfy the first prong of a *Strickland* claim with regard to any of his claims of ineffective assistance of counsel. First, counsel was not ineffective for failing to seek

exclusion of petitioner's and Langenegger's statements to Sergeant Tarabini as coerced and unreliable because, as set forth above in Argument I.F.1, there is no legal merit to such arguments. The failure to bring a motion does not constitute ineffectiveness if the motion is based on a meritless argument. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005); *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir.1999); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.1996).

Second, counsel was not ineffective for relying on Pascali's criminal record to impeach him without conducting a further investigation into his background. Petitioner's argument "does not involve a failure to investigate, but, rather, petitioner's dissatisfaction with the degree of . . . [his] attorney's investigation . . . ." *Lewis v. Alexander*, 11 F.3d 1349, 1353 (6th Cir. 1993). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* Assuming that counsel did not conduct an additional investigation in this case, petitioner has not shown that such decision was unreasonable given counsel's thorough impeachment of Pascali based on his criminal record. Nor has petitioner alleged what additional facts counsel would have discovered had he conducted such investigation, or that such information would have led to a more damaging impeachment of Pascali. *See United States v. Schaflander*, 743 F.2d 714, 721 (9th Cir. 1984) (to succeed on an ineffective assistance claim, a petitioner must make a sufficient factual showing to substantiate his claims). As to petitioner's subsidiary claim that counsel should have objected to the prosecution's evidence and argument regarding Pascali's credibility and motivation for testifying, we note that there was no legal basis for such objection, as set forth in Arguments I.B. and I.E. "[T]rial counsel cannot have been ineffective for failing to raise a meritless objection." *Juan H. v. Allen,* 408 F.3d at 1273.

Third, counsel was not ineffective for failing to call an expert on investigative procedures because he was able to effectively cross-examine Sergeant Tarabini on the subject. *See Smith v. Angelone*, 111 F.3d 1126; 1132-1133 (4th Cir. 1997) (counsel not incompetent for failing to call

defense expert where counsel obtained the same information and pursued the same defense via cross-examination of prosecution experts).

Fourth, counsel was not ineffective in failing to investigate the alleged inconsistency in Langenegger's testimony regarding when his jaw was broken. As an initial matter, we note that petitioner does not specify where in the record Langenegger allegedly changed his testimony regarding when his jaw was broken. *See United States v. Schaflander*, 743 F.2d at 721 (to succeed on an ineffective assistance claim, a petitioner must make a sufficient factual showing to substantiate his claims). In any event, counsel was not ineffective for relying on both Langenegger's and Officer Zuger's testimony that Langenegger's jaw was broken in the attack. *See* 3 RT 190, 392.

Finally, counsel was not ineffective for failing to call his own gang expert. Given that the prosecution's gang evidence could not be seriously disputed, counsel's decision not to call his own expert was reasonable. *Miller v. Anderson*, 255 F.3d 455, 458 (7th Cir. 2001) (calling an expert witness may be ineffective where it paves the way for devastating cross-examination); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) (trial counsel not ineffective for failing to call expert who could be subjected to cross-examination based upon equally persuasive contrary opinions); *Shumate v. Newland*, 75 F.Supp.2d 1076, 1093 (N.D. Cal. 1999) (no ineffectiveness where counsel believed that expert's testimony would be too easily discounted by the prosecution). Nor has petitioner provided any evidence that his proposed gang expert would provide favorable testimony. *See Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) (in absence of declaration, "speculation about what an expert could have said is not enough to establish prejudice" for Sixth Amendment claim).

Petitioner has also failed to establish that he suffered any prejudice as a result of any of counsel's alleged omissions. It is difficult to see how any the alleged errors petitioner complains about would have resulted in a more favorable verdict. Accordingly, petitioner's ineffectiveness claims fail.

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III.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON AIDING AND ABETTING

Petitioner asserts that the trial court's instructions regarding aiding and abetting violated his right to due process because they did not define the terms felonious assault, felonious battery, and misdemeanor assault as used in CALJIC No. 3.02, or specify whether the crimes were misdemeanors or felonies. Petition at 6AA; *see also* Exh. 4 at 20. Petitioner raised this claim on direct appeal, and the California Court of Appeal issued a reasoned decision rejecting the claim. *See* Exh. 3 at 18-21. The Court of Appeal's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

A. Instructions On Aiding And Abetting

The trial court instructed the jury with CALJIC Nos. 3.01 and 3.02 as follows:

> A person aids and abets the commission or attempted commission of a crime when he:
>
> One. With knowledge of the unlawful purpose of the perpetrator; and
>
> Two. With the intent of purpose of committing or encouraging or facilitating the commission of the crime; and
>
> Three. By act or advice aids, promotes, encourages, or instigates the commission of the crime.
>
> A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.
>
> One who aids and abets in the commission of a crime or crimes is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by the principal which is a natural and probable consequence of the crimes originally aided and abetted.
>
> In order to find the defendant guilty of the crimes as charged in Counts 1 or 2, you must be satisfied beyond a reasonable doubt that:
>
> One. The crime or crimes of misdemeanor assault and/or battery was or were committed;

> Two. That the defendant aided and abetted those crimes;
>
> Three. That a coprincipal in that crime committed the crime of felonious assault or battery;
>
> Four. The crimes of felonious assault and/or battery were a natural and probable consequence of the commission of the crimes of misdemeanor assault and/or battery.

6 RT 973-975; 2 CT 458-459.

B. California Court Of Appeal Opinion

The California Court of Appeal found no instructional error. It concluded that the trial court instructed the jury as to the elements of assault, assault by means of force likely to produce great bodily injury, and battery with serious bodily injury. *See* Exh. 3 at 20. It additionally found that the trial court identified each of these crimes as misdemeanors or felonies. *Id.* Citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991), the court found "no reasonable likelihood that the jury misunderstood these instructions." *Id.* at 21.

C. The Aiding And Abetting Instructions Did Not Violate Due Process

The California Court of Appeal's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. A claim of state instructional error can be the basis of federal habeas relief only if the error, considered in light of all the instructions given, "'so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire,* 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The test for constitutional error is whether there is a "reasonable likelihood" the jury misapplied the instructions. *Id.*

Petitioner claims that the trial court failed to define the terms felonious assault, felonious battery, and misdemeanor assault as used in its aiding and abetting instructions, and also failed to specify whether the crimes were misdemeanors or felonies. Petitioner's claim fails because the jury was given the proper definitions of misdemeanor assault, felony assault, and felony battery elsewhere in the court's instructions.

Immediately after instructing the jury on the principles of aiding and abetting, the court instructed the jury that "the crime of assault, in violation of Penal Code section 240, *a misdemeanor*,

is a lesser crime included in the crime charged in Count 1. . . Assault has been previously described for you following the elements of assault by means of force likely to produce great bodily injury." 6 RT 975, emphasis added. As was pointed out to the jury, the court had previously instructed the jury with CALJIC No. 9.00. *See* 6 RT 963-964. Thus, the jury was properly instructed as to elements of misdemeanor assault.

Moreover, immediately before instructing the jury on the elements of counts one and two—assault by means of force likely to cause great bodily injury and battery with serious bodily injury—the court instructed the jury that "[t]he Information in this case alleges that each defendant committed two felonies. . . ." 6 RT 962-963, 965. The jury was therefore also properly instructed as to the elements of felony assault and felony battery. Based on the instructions on the whole, there is no reasonable likelihood that the jury misunderstood the court's aiding and abetting instructions in the manner suggested by petitioner. *Estelle v. McGuire*, 502 U.S. at 72. No due process violation is shown.

IV.

PETITIONER'S CLAIM OF STATE LAW SENTENCING ERROR IS NOT COGNIZABLE ON FEDERAL HABEAS; EVEN IF COGNIZABLE, THE CLAIM LACKS MERIT

Petitioner contends that the trial court abused its discretion under state law by refusing to dismiss his prior strike convictions. Petition at 6AF-6AI; *see also* Exh. 4 at 26-29. Petitioner's claim, however, involves only a question of state law, and is not cognizable on federal habeas. Even if cognizable, the California Court of Appeal rejected the claim on direct review, *see* Exh. 3 at 24-27, and such decision was not contrary to, nor an unreasonable application of, clearly established law.

A. Sentencing Hearing

At sentencing, petitioner brought a motion to dismiss his prior strike convictions. 8 RT 1077-1081. The trial court denied the motion. 8 RT 1085.

B. California Court Of Appeal Opinion

The California Court of Appeal ruled that the trial court did not abuse its discretion under

state law by refusing to dismiss the prior strike convictions. Exh. 3 at 26. The court found that "a review of the record, including the probation report, shows no arbitrary or irrational decision by the trial court." *Id.* In support of its decision, the court noted petitioner's extensive criminal history, including his prior strikes for vehicular manslaughter; his repeated incarcerations since the time he was 21 years old; his previous poor performance on parole; the fact that petitioner's assault on Langenegger occurred while petitioner was in custody awaiting sentencing in another case; and his failure to take responsibility for the assault. *Id.*

C. The Claim Is Not Cognizable; In The Alternative, It Lacks Merit

A federal court considering a habeas petition by a state prisoner is limited to deciding whether the petitioner's conviction violates the federal constitution. 28 U.S.C. § 2254(a). Habeas relief does not lie for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *see also Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (federal habeas relief "unavailable for alleged error in the interpretation or application of state law"). The Ninth Circuit has refused to consider errors in the application of state sentencing law on federal habeas. *See, e.g., Souch v. Schaivo*, 289 F.3d 616, 623 (9th Cir. 2002); *Christian v. Rhode*, 41 F.3d 461, 469 (9th Cir. 1994); *Miller v. Vasquez*, 868 F.2d 1116, 1118-1119 (9th Cir. 1989). Here, petitioner makes no references to federal law in setting forth his claim. *See* Petition at 6AF-6AI; *see also* Exh. 4 at 26-29. Accordingly, his claim is not cognizable on federal habeas.

Even if the claim is cognizable, petitioner has failed to show that the California Court of Appeal's decision was contrary to, or an unreasonable application of, clearly established Supreme Court authority. The misapplication of state sentencing law violates due process only if the resulting sentence is arbitrary and capricious. *Richmond v. Lewis*, 506 U.S. 40, 50 (1992). In determining whether to exercise its discretion to dismiss petitioner's prior strike convictions, the trial court reviewed the probation report and heard the arguments of counsel. *See* 8 RT 1077-1085. The probation report demonstrates that petitioner "has spent most of his time in prison," since he was 21 years old. 3 CT 680. His record "consists of 9 felonies and 11 misdemeanors." 3 CT 681. At least two of the prior felonies qualified as strikes. 3 CT 681. Petitioner explained to the probation officer

"that he went to prison for manslaughter after killing 2 friends in a car accident. After his release, he stayed out of custody for 9 months before being violated for possession of [a] controlled substance. He was again released, but returned to custody 1 month later, again for drug possession." 3 CT 680. At the time of the assault on Langenegger, petitioner was in custody awaiting sentencing for possession of narcotics for sale. 3 CT 678. Less than a month later, petitioner was sentenced to a nine-year prison term on that case. 3 CT 678. Notably, the possession for sale case was originally charged as a three strikes case, and as part of his plea, the court dismissed one of the strikes. *See* 8 RT 1082, 1084. Regarding the current incident, Carrasco continued to deny any responsibility for the assault and denied being in a gang. 3 CT 680.

Based on this record, the trial court did not act arbitrarily or capriciously in determining that—based on petitioner's prior criminal history and incarcerations, his previous poor performance on parole, the circumstances of his current crime, the fact that he was already in custody when the current crime took place, and his failure to take responsibility for his actions—dismissal of the prior strike convictions was unwarranted. Accordingly, no due process violation is shown.

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CONCLUSION

Accordingly, respondent respectfully requests that the petition for writ of habeas corpus be denied.

Dated: August 28, 2008

Respectfully submitted,

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